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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of MAUREEN and
JEFFREY MILLER.

MAUREEN MILLER,

Appellant,

v.

JEFFREY MILLER,

Respondent.

D054457

(Super. Ct. No. DN133986)

APPEAL from orders of the Superior Court of San Diego County, Eugenia A.

Eyherabide, Judge. Reversed and remanded.

Maureen Miller (Maureen)¹ appeals from two orders of the family court: (1) The court's November 7, 2008² postjudgment findings and order after hearing on her former husband Jeffrey Miller's (Jeffrey's) order to show cause (OSC) request to modify child

¹ We refer to the parties by their first names based upon custom in family law matters. (See *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475, fn. 1.) We intend no disrespect.

² All further dates are to calendar year 2008 unless otherwise specified.

support (November 7 order) and (2) the court's November 26 ex parte minute order denying Maureen's motion for reconsideration of the November 7 order (November 26 order). Jeffrey is a majority-interest business owner who is not paid a salary and who earned about \$1.6 million in Schedule K-1 income³ in 2007. Notwithstanding the requirements set forth in rule 5.6.3 of the Superior Court of San Diego County, Local Rules⁴ (discussed, *post*), the documentation supporting the income and expense declaration Jeffrey submitted with his request for modification of child support consisted of four "draw" paystubs, each for a two-week pay period, and each in the amount of about \$35,000 for four consecutive months. Maureen filed written objections to Jeffrey's income and expense declaration, asserting the supporting documentation did not comply with rule 5.6.3.

In its November 7 order, the court found that Jeffrey had a monthly income of \$35,000 and ordered the reduction of his monthly child support obligation from \$3,300 to \$1,303. Maureen challenged the November 7 order by filing a motion for reconsideration on the grounds (among others) that the court incorrectly calculated Jeffrey's monthly income and did not include in the reduced amount of monthly child support the

³ Pursuant to Evidence Code sections 452, subdivision (c), and 459, this court takes judicial notice that the Internal Revenue Service's Form 1065, also known as Schedule K-1, is used to report income and other distributions from partnerships, S corporations, and some estates and trusts. (See IR-2005-34, *IRS Offers Tips for Accurate Schedule K-1 Filing* (Mar. 22, 2005) <<http://www.irs.gov/newsroom/article/0,,id=137027,00.html>> [as of Sept. 16, 2009].)

⁴ All further rule references are to the Superior Court of San Diego County, Local Rules.

supervised visitation costs she was paying every month. In its November 26 ex parte order, the court denied her motion for reconsideration without a statement of reasons.

Maureen contends that (1) her motion for reconsideration was timely made and proper, and the court abused its discretion in failing to correct its errors in calculating child support; (2) given the disparity in the parties' income, the court should have ordered Jeffrey to pay the cost of the court-ordered supervised visitation, and the effect of its failure to do so was that the court ordered a below-guideline child support amount; (3) the court erred when it violated the California uniform guidelines for determining child support by refusing to consider all of Jeffrey's income and ordering child support below the mandatory guidelines; and (4) the court erred by failing to rule on, or allow oral argument on, Maureen's procedural objections to Jeffrey's income and expense declaration. We reverse the portions of the November 7 order that (1) determine Jeffrey's monthly income to be approximately \$35,000; (2) reduce the guideline child support amount to \$1,303; and (3) provide the order is retroactive to July 1.

FACTUAL AND PROCEDURAL BACKGROUND

In this case, the court entered a stipulated judgment that granted a dissolution of Maureen and Jeffrey's marriage, effective June 12, 2006. There are three children of the former marriage: A son, who is the oldest, and two daughters. The court ordered Jeffrey to pay spousal support to Maureen in the monthly amount of \$3,500.

In addition, effective January 1, 2007, the court ordered Jeffrey to pay child support to Maureen in the monthly amount of \$3,300 "premised upon a 50/50 timeshare," and upon findings that Jeffrey's gross monthly income was \$35,000, Maureen's gross

monthly Social Security income was \$1,300, and the monthly Social Security income she was receiving on behalf of the children was \$600.

In April 2007 the court ordered that Maureen have no contact with her daughters. Later that month, the court granted Maureen supervised visitation with them, but in the middle of the following month (May 2007) ordered the suspension of such visitation. Later that year, in early August, the court again granted Maureen supervised visitation with her daughters and in November 2007 granted Maureen unsupervised visitation with them. However, the following April, the court again ordered that Maureen's visitation with them be supervised.

A. Jeffrey's Deposition

In mid-June, Maureen took Jeffrey's deposition. Jeffrey testified that he was not paid a salary. He also stated that he had already produced a "K-1" and that in 2007 his K-1 income was about \$1.6 million, his net income was \$45,000, and the difference between his K-1 income and his net income was "[n]oncash reinvestment in the growth of the company." Jeffrey explained that "noncash reinvestment" meant he "paid taxes on any growth of the company," and the reinvestment took the form of "growth for inventory, capital equipment purchase, [and] research and development," among other things. Jeffrey also stated that his ownership interest in his company was about 63 percent.

B. Jeffrey's OSC Request To Modify Child Support

Later in June, Jeffrey filed his OSC for modification of child support, requesting that the court (1) order guideline child support and (2) order Maureen to reimburse child

support overpayments. In support of his OSC request, Jeffrey submitted his own declaration, in which he recounted the terms of the judgment and the history of Maureen's visitation with their daughters. He indicated that he had had physical custody of his daughters since early April 2007 and that Maureen had "minimal supervised visitation." Jeffrey also stated he had been providing 100 percent of his daughters' support, but had been paying child support to Maureen and in June he paid to Maureen child support in the amount of \$2,181, which represented the child support payment of \$3,300 less one-half of the "children's expenses," in the amount of \$1,120, as itemized in an attachment to his declaration.

Also in support of his OSC request, Jeffrey filed his income and expense declaration dated June 19, in which he reported a monthly gross income of \$34,267 from his employment as manager of IVS Technologies, LLC. The income documentation attached to the June 19 income and expense declaration consisted of *four* paystubs, each showing a draw in the amount of \$34,266.67, for the following four two-week pay periods: (1) January 16, 2008 to January 31, 2008; (2) December 16, 2007 to December 31, 2007; (3) November 16, 2007 to November 30, 2007; and (4) October 16, 2007 to October 31, 2007.

C. Maureen's Notice of Objection

In late July, in opposition to Jeffrey's OSC requests, Maureen filed a notice of objection in which she objected to Jeffrey's June 19 income and expense declaration on the grounds that (1) he failed to provide the proper supporting documentation for self-

employed individuals, as required by rule 5.6.3;⁵ (2) the only documentation supporting his June 19 income and expense declaration was the four paystubs (discussed, *ante*), and thus Jeffrey was attempting to conform to the standards set forth in rule 5.6.3 that apply to a salaried employee,⁶ although he was not a salaried employee, as shown by his deposition testimony at page 11 that, "I'm not paid a salary"; and (3) Jeffrey provided no supporting documentation regarding partnership income, as required by rule 5.6.3.⁷

D. Hearing

In October the court held a hearing on Jeffrey's OSC to modify child support. Attorneys Paul Gavin and Jeffrey Fritz appeared on behalf of Maureen and Jeffrey, respectively. Gavin repeatedly informed the court that Maureen had previously filed a notice of objections to Jeffrey's June 19 income and expense declaration, which (Gavin asserted) violated the provisions of rule 5.6.3 that sets forth the documentation that must

⁵ Rule 5.6.3 provides in part: "To verify current income, parties must serve copies of the following documents with their Income and Expense Declaration. Documents that are required by this rule to be served with the Income and Expense Declaration may be lodged with the court at the time of the hearing. [¶] . . . [¶] **For self-employed individuals, including independent contractors:** A schedule reflecting all compensation received year-to-date and the last two filed IRS 1040 Schedule C or C-EZ; profit-and-loss statements and balance sheets for the two prior calendar years and the current year-to-date."

⁶ Rule 5.6.3 provides in part: "**For salaried employees:** The prior calendar year's W-2 and all pay stubs for the last two months showing all forms of year-to-date earned income."

⁷ Rule 5.6.3 provides in part: "**For partnership income:** A schedule reflecting all compensation received year-to-date, all IRS K-1's for the two prior years; the last filed IRS Schedule E (Part II); profit and loss statements and balance sheets for the two prior calendar years and the current year-to-date."

be attached to an income and expense declaration. Specifically, Gavin argued that for employees who are shareholders in a closely held corporation, rule 5.6.3 required the attachment of "[t]he prior calendar year's W-2; all pay stubs for the last two months showing all forms of year-to-date earned income; all IRS K-1's for the past two prior years; the last filed IRS Schedule E Part II; profit and loss statements and balance sheets for the two prior calendar years and the current year-to-date." Gavin informed the court that the evening before the hearing Jeffrey served Maureen with an income and expense declaration supported by paystubs for June 30, July 31 and September 30; and argued that "[t]here are no K-1's." Gavin indicated that Jeffrey testified at his deposition that his K-1 income was \$1.6 million and argued, "[W]e don't have a profit and loss statement. We don't have K-1's for the past two prior years and we do not have the IRS Schedule E [(Part II)]." Asking for a statement of decision, Gavin argued that both of Jeffrey's income and expense declarations were defective in that they failed to comply with the documentation requirements of rule 5.6.3, and it was "unreasonable to proceed with such defective pleadings."

Noting for the record that this case "has gone to something like 20 volumes and we have volumes of lodgments," that the court had over six "huge" binders behind the bench, and that it had been handed a 3- to 4-inch notice of lodgment with numerous documents, the court stated, "I am not going to even start playing the game as to what these parties' incomes are."

Fritz then indicated on Jeffrey's behalf that the court ordered a special master⁸ in August at Maureen's request, but Maureen did not pay the special master, who did not complete a report. Fritz argued that Jeffrey had custody of all three children, Maureen had about 10 to 12 percent visitation, she was receiving child support in the monthly amount of \$3,300, Jeffrey acquired custody after the court made the child support award, Jeffrey was also paying about \$7,000 per month for private school expenses, and both income and expense declarations were timely under the local rules. Fritz stated that Jeffrey candidly indicated at his deposition what his K-1 income was and had submitted to the court a CPA's declaration indicating what his K-1 income was. He asked the court to immediately "stay the child support" pending the completion of the special master's work. Gavin disputed that the court had appointed a special master and had ordered Maureen to pay or advance his costs.

After admonishing both attorneys for talking at the same time and being "hard" on the court reporter, the court indicated it had reviewed the court minutes and could not tell with certainty whether it had appointed a special master and had ordered Maureen to pay or advance his costs. Gavin told the court that Maureen had asked for the appointment of a special master and had asked that Jeffrey pay for the master. Gavin acknowledged that the court declined to order Jeffrey to pay for the special master, and it told the parties that if Maureen wanted Tony Yip to do an income analysis, she could pay for it.

⁸ Tony Yip.

Fritz replied that Maureen had elected not to pay for the special master, and she was "stuck with her decision."

The court stated that "[i]t's up to the parties to bring me the evidence," and "[i]f someone chooses not to use Mr. Yip or whomever . . . for me to make decisions based on the evidence that they bring me, I can't force that issue." The court reserved jurisdiction over child support and ruled it would temporarily modify child support based on the evidence it had.

When Gavin attempted to respond, the court stated that "everybody has had ample time to give me what they need to give me today." Reiterating that "[t]his is temporary," the court stated it was "happy to reserve jurisdiction and reconsider this issue." The court took the matter under submission, indicating that it would consider the income and expense declarations because under the local rules they can be filed on the day of the hearing, but it would exclude the other pleadings served that day.

E. November 7 Order

In its November 7 order, based on the evidence presented, the court found that Jeffrey's monthly income was about \$35,000, and Maureen's income was about \$1,400. The court ordered that monthly guideline child support be reduced to \$1,303 and the order was made retroactive to July 1. The court also found that if Jeffrey "has overpaid child support for the previous months, said overpayment shall be repaid no later than" December 15. Nothing in the record indicates that the court ruled on Maureen's objections to Jeffrey's June 19 income and expense declaration in rendering the November 7 order.

F. Maureen's Motion for Reconsideration

On November 25 Maureen filed a motion for reconsideration supported by her own declaration, in which she claimed (1) the court incorrectly calculated Jeffrey's monthly income, which resulted in a DissoMaster software calculation error, because Jeffrey's income and expense declaration did not comply with rule 5.6.3, the court only used two weeks of Jeffrey's income to calculate his monthly income (which his own paystubs showed should have been found to be \$68,533.34), and the court did not count his K-1 income from his "business/partnership," which was \$1.6 million (or \$133,333 per month) according to his deposition testimony; (2) the court failed to rule on Maureen's objections to Jeffrey's income and expense declaration and did not include in the reduced amount of monthly child support the supervised visitation costs she was paying every month in the amount of \$2,145; (3) the court should correct the foregoing mistakes; and (4) the court should grant a stay on the portion of the November 7 order requiring immediate repayment to Jeffrey in a sum that "could amount to nearly \$10,000."

G. November 26 Order Denying Maureen's Motion for Reconsideration

Maureen challenged the November 7 order by filing a motion for reconsideration on the grounds that the court incorrectly calculated Jeffrey's monthly income, and it did not include in the reduced amount of monthly child support the cost of the supervised visitation she was paying every month. In its November 26 ex parte minute order, the court denied her motion for reconsideration without a statement of reasons. Maureen's appeal followed.

DISCUSSION

I. *NOVEMBER 7 ORDER*

Maureen contends the November 7 order, which reduced Jeffrey's monthly child support obligation from \$3,300 to \$1,303 based on the court's finding that his monthly income was approximately \$35,000, must be reversed because (1) given the disparity in the parties' incomes, the court abused its discretion in not ordering Jeffrey to pay the cost of the court-ordered supervised visitation; (2) the court erred in not considering all of Jeffrey's monthly income, including his monthly Schedule K-1 income in the amount of \$133,000; (3) the court erred by failing to rule or allow oral argument on Maureen's objection to Jeffrey's June 19 income and expense declaration that it failed to comply with rule 5.6.3 in that "it did not include proper pay stubs or [Schedule] K-1s"; and (4) as a result of the foregoing errors, the court reduced Jeffrey's monthly child support obligation to an amount below the uniform child support guideline amount.

We conclude that the portions of the November 7 order in which the court found that Jeffrey's monthly income is approximately \$35,000, the guideline child support amount is \$1,303, and the order reducing child support is retroactive to July 1 must be reversed.

A. Applicable Legal Principles

"California has a strong public policy in favor of adequate child support. [Citations.] That policy is expressed in statutes embodying the statewide uniform child support guideline." (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 283 (*Cheriton*)). Courts are required to adhere to the statewide uniform guideline formula set

forth in Family Code⁹ section 4055 and may depart from the guideline only in specified circumstances provided by statute. (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1326 (*Wittgrove*), citing § 4052.)

The section 4055 guideline formula for determining the amount of child support is based on the net disposable incomes of the parents. (*County of Placer v. Andrade* (1997) 55 Cal.App.4th 1393, 1395 (*Andrade*).) The court must first calculate the annual gross income of the parent, defined in section 4058, subdivision (a) as "income from whatever source derived, except as specified in subdivision (c)." Section 4058, subdivision (a)(2) provides that annual gross income includes "[i]ncome from the *proprietorship of a business*, such as gross receipts from the business reduced by expenditures required for the operation of the business." (Italics added.) Subdivision (c) of section 4058 expressly excludes from the calculation of annual gross income only (1) "any income derived from child support payments actually received," and (2) "income derived from any public assistance program, eligibility for which is based on a determination of need."

The parent's monthly net disposable income is derived from the calculation of annual gross income under section 4058. (*Andrade, supra*, 55 Cal.App.4th at pp. 1395-1396.) Section 4059 defines the term "annual net disposable income." A parent's annual net disposable income is "derived by deducting specified amounts from the 'annual gross income' (§ 4059), which is then divided by 12 to arrive at an average 'monthly net disposable income.' (§ 4060.)" (*Andrade, supra*, 55 Cal.App.4th at p. 1396, fn. 5.)

⁹ All further statutory references are to the Family Code.

In *Wittgrove*, this court stated that "[a]lthough section 4053 grants a court broad discretion in applying the principles in implementing the statewide uniform guidelines for child support, the main concern is the child's best interests." (*Wittgrove, supra*, 120 Cal.App.4th at p. 1326.)

1. *Standards of review*

We review a child support order for an abuse of discretion. (*Cheriton, supra*, 92 Cal.App.4th at p. 282.) We cannot substitute our judgment for that of the trial court; we only determine whether any judge reasonably could have made such an order.

(*Wittgrove, supra*, 120 Cal.App.4th at p. 1327.) "[T]he appropriate test of abuse of discretion is whether or not the trial court exceeded 'the bounds of reason, all of the circumstances before it being considered.' " (*In re Marriage of Carter* (1971) 19 Cal.App.3d 479, 494.) Our review of factual findings is limited to a determination of whether there is any substantial evidence to support those findings. (*Wittgrove, supra*, 120 Cal.App.4th at p. 1327.)

B. *Analysis*

We conclude that Jeffrey's June 19 income and expense declaration violated the requirements of rule 5.6.3 in that the declaration was not supported by the documentation for partnership income specified in that rule.

Thus, if Jeffrey's income qualified as partnership income, he was required under the foregoing provision of rule 5.6.3 to file and serve the following documentation in support of his June 19 income and expense declaration: (1) a "schedule reflecting all compensation received year-to-date, all IRS [Schedule] K-1's for the two prior years"; (2)

the "last filed IRS Schedule E (Part II)"; and (3) "profit and loss statements and balance sheets for the two prior calendar years and the current year-to-date."

The record establishes that Jeffrey's income did consist of partnership income, and thus he was he was required under rule 5.6.3 to file and serve the foregoing documentation. During his deposition, Jeffrey testified he was not paid a salary. He also indicated that he owned a 63 percent interest in his company, IVS Technologies, LLC; he had prepared a Schedule K-1; and his Schedule K-1 income in 2007 was about \$1.6 million. As already discussed (see fn. 3, *ante*), the Internal Revenue Service's Form 1065, also known as Schedule K-1, is used to report income and other distributions from *partnerships*.

Because Jeffrey's income consisted of partnership income, under rule 5.6.3 he was required to file and serve in support of his June 19 income and expense declaration (1) his Schedule K-1's for the prior two years; (2) the last Schedule E (Part II) he filed with the IRS; and (3) profit and loss statements and balance sheets for the prior two calendar years and the current year-to-date. The record demonstrates that Jeffrey did not file or serve any of these documents with his June 19 income and expense declaration. Instead, he filed and served only the four "draw" paystubs.

Because Jeffrey's June 19 income and expense declaration was not supported by the documentation required by rule 5.6.3, it was not properly verified and the court abused its discretion in considering it over Maureen's objection.

Jeffrey's unverified claim in his June 19 income and expense declaration that his monthly gross income was \$34,267 was objectionable on another ground raised by

Maureen in her notice of objection. As she correctly pointed out, and as already discussed, the only income documentation attached to that income and expense declaration consisted of four paystubs, each of which indicated a "draw" in the amount of \$34,266.67 for *two-week* pay periods, not four-week pay periods. Jeffrey does not contend, and nothing in the record indicates, that he only worked two weeks during each of those four months. Jeffrey's own documentation thus suggested that his actual *monthly* gross income was at least twice the amount indicated on his paystubs.

In finding Jeffrey's monthly income was \$35,000, the court improperly relied on Jeffrey's unverified, and apparently inaccurate, assertion that his monthly gross income was only \$34,267. Because the November 7 order reducing Jeffrey's child support obligation was based on an unverified and apparently inaccurate income and expense declaration that he filed in violation of rule 5.6.3, we reverse the portions of that order determining Jeffrey's monthly income to be approximately \$35,000, reducing the guideline child support amount to \$1,303, and providing the order reducing child support is retroactive to July 1.¹⁰

II. NOVEMBER 26 ORDER DENYING RECONSIDERATION

Because we have concluded that portions of the November 7 order must be reversed, we need not, and do not, reach the issue of whether the court abused its

¹⁰ Because the November 7 order must be reversed for the foregoing reasons, we need not reach the issue of whether the court abused its discretion by not ordering Jeffrey to pay the cost of the court-ordered supervised visitation. However, it appears Maureen's behavior led to the court-ordered restrictions on her visitation with her daughters, thereby creating the costs involved in the supervised visitation.

discretion in denying Maureen's motion for reconsideration challenging the November 7 order.

DISPOSITION

We reverse the portions of the November 7 order determining that Jeffrey's monthly income is approximately \$35,000, that the guideline child support amount is \$1,303, and that the order reducing the amount of child support is retroactive to July 1, 2008. In all other respects the order is affirmed. On remand, the trial court shall recalculate Jeffrey's monthly income and the guideline child support award. Jeffrey shall pay Maureen's costs on appeal.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.